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# Ensuring the preservation of submerged treasures for the next generation: the protection of underwater cultural heritage in international law

## Abstract

This paper views the UCH Convention as an important and progressive development in the field of international law. The UCH Convention, akin to the LOSC, is likewise a compromise package of solutions to a delicate issue of indisputable global significance. Hence, despite its flaws, it should be regarded no less as a monumental international instrument for providing a wider scope of protection for underwater cultural heritage. The fact that the UCH Convention was adopted was success enough. In accordance with its Article 27, the UCH Convention entered into force on 2 January 2009 for States which have deposited their respective instruments of ratification, acceptance, approval or accession on or before 2 October 2008. It shall enter into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.

This paper will examine the international legal framework on the protection of underwater cultural heritage with particular emphasis on the protective regimes under the UCH Convention and the LOSC. This paper aims to: first, provide an overview of the theoretical and historical antecedents of the UCH Convention and its relation to the LOSC; second, discuss the salient provisions of the UCH Convention; third, compare the protective regimes afforded to underwater cultural heritage within the different maritime zones under both the LOSC and the UNESCO Convention; and fourth, identify the promises of the UNESCO Convention' framework as well as issues and gaps that need to be addressed.

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**Ensuring the Preservation of  
Submerged Treasures for the  
Next Generation: The Protection  
of Underwater Cultural Heritage  
in International Law**

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# Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law

Lowell Bautista<sup>1</sup>

## 1. Introduction

In a historic moment that culminated almost a decade of negotiations, the Convention on the Protection of the Underwater Cultural Heritage (UCH Convention) was adopted on 2 November 2001.<sup>2</sup> The UCH Convention is the fourth international instrument dealing with cultural heritage adopted under the aegis of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the first one specifically addressing the protection of underwater cultural heritage (UCH) in international law.<sup>3</sup> The UCH Convention is the first universal instrument that exclusively deals with the preservation of UCH in international waters. The UCH Convention builds upon and addresses the gaps of the very limited, vague and contradictory protective regime afforded to UCH within the framework of the United Nations Convention on the Law of the Sea (LOSC).<sup>4</sup>

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<sup>2</sup> *The UNESCO Convention of the Protection of the Underwater Cultural Heritage*, Doc. 31 C/24, Paris, 3 Aug 2001; 41 ILM 40 (2002). Hereinafter UCH Convention. On international legal context of the Convention, see Carlos Espósito and Cristina Fraile, “The UNESCO Convention on Underwater Cultural Heritage,” in David D. Caron and Harry N. Scheiber, *Bringing New Law to Ocean Waters* (Leiden and Boston, 2004), 201-223.

<sup>3</sup> The other three were: The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (294 UNTS 215); the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (10 ILM 289); and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (1037 UNTS 151).

<sup>4</sup> *United Nations Convention for the Law of the Sea*, (opened for signature December 10, 1982), U.N. Doc. A/CONF. 62/122 (1982) (entered into force November 16, 1994), reprinted in 21 I.L.M. 1261. See discussion of Tullio Scovazzi, “A Contradictory and Counterproductive Regime” in Roberta Garabello and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 3 – 17.

The UCH Convention stands as *lex specialis* for the protection of UCH, while the LOSC remains as the authoritative *lex generalis* for the whole of the law of the sea.<sup>5</sup> The UCH Convention, keeps the delicate balance of interests embodied in the LOSC as well as the need to codify and progressively develop rules relating UCH consistent with international law and practice.<sup>6</sup> The UCH Convention states that nothing in the convention “shall prejudice the rights, jurisdiction and duties of States under international law”, including the LOSC and that the UCH shall be “interpreted and applied in the context of and in a manner consistent with international law,” including the LOSC.<sup>7</sup> It is in view of this inextricable link between the UCH Convention and the LOSC that a meaningful discussion of the international legal framework on the protection of UCH necessitates an analysis of both.

This paper views the UCH Convention as an important and progressive development in the field of international law. The UCH Convention, akin to the LOSC, is likewise a compromise package of solutions to a delicate issue of indisputable global significance.<sup>8</sup> Hence, despite its flaws, it should be regarded no less as a monumental international instrument for providing a wider scope of protection for underwater cultural heritage. The fact that the UCH Convention was adopted was success enough. In accordance with its Article 27, the UCH Convention entered into force on 2 January 2009 for States which have deposited their respective instruments of ratification, acceptance, approval or accession on or before 2 October 2008. It shall enter into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.<sup>9</sup>

This paper will examine the international legal framework on the protection of underwater cultural heritage with particular emphasis on the protective regimes under the UCH Convention and the LOSC. This paper aims to: **first**, provide an overview of the theoretical and historical antecedents of the UCH Convention and its relation to the LOSC; **second**, discuss the salient provisions of the UCH Convention; **third**, compare the protective regimes afforded to underwater cultural heritage within the different maritime zones under both the LOSC and the UNESCO Convention; and **fourth**, identify the promises of the UNESCO Convention framework as well as issues and gaps that need to be addressed.

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<sup>5</sup> Jean Allain, “Maritime Wrecks: Where the *Lex Ferenda* of Underwater Cultural Heritage Collides with the *Lex Lata* of the Law of the Sea Convention,” *Virginia Journal of International Law*, 38 (1998): 749.

<sup>6</sup> See Preamble, UCH Convention.

<sup>7</sup> Article 3, UCH Convention.

<sup>8</sup> Craig Forrest, “An International Perspective on Sunken State Vessels as Underwater Cultural Heritage,” *Ocean Development and International Law*, 34 (2003): 41.

<sup>9</sup> Article 27, UCH Convention. As of 14 April 2013, the UCH Convention has 42 States parties.

## **2. The development of an international regime to preserve underwater cultural heritage**

### **2.1. The imperative to protect underwater cultural heritage**

Until quite recently, for both marine archeologists and lawyers, the legal regime of marine archeology has been largely a neglected topic. In the past, the absence of the necessary technology to explore, much more to exploit, underwater sites, especially those lying beyond areas of national jurisdiction, hardly created any jurisdictional problems.<sup>10</sup> The recovery of artifacts from the sea was underestimated because it was not seen as economically viable.<sup>11</sup>

While not much has changed with the legal regime, the leaps in technology have made the exploration, recovery and disposition of artifacts of historical and cultural value from the sea economically viable on a commercial scale.<sup>12</sup> It has become a very lucrative commercial maritime industry.<sup>13</sup> The advent of advanced technology now enables those who possess them to recover almost any object in the sea, at any depth, anywhere in the globe.<sup>14</sup> It has also allowed a dramatic increase in the illicit recovery of and trade in underwater cultural heritage.<sup>15</sup>

It must be understood that underwater cultural artifacts are a finite resource. Once they are damaged or destroyed, they are irretrievably lost. These

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<sup>10</sup> Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, 1995), 40.

<sup>11</sup> It is widely accepted that for the recovery of a wreck to be commercially viable, it must be worth more than \$10 million and there are only around 100 – 200 such wrecks in the deep seabed. See UNESCO Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, Paris 22-24 May 1996; Doc CLT-96/CONF. 605/6 at 12.

<sup>12</sup> Jeffrey T. Scrimo, "Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks," *Ocean and Coastal Law Journal*, 5 (2000): 271.

<sup>13</sup> For example, the historic British warship, HMS *Sussex*, an 80-gun warship that sank in deep water off Gibraltar in 1694, reputedly carried gold and/or silver coins estimated to be now worth several hundred million, to a billion dollars. See Sarah Dromgoole, "Murky Waters for Government Policy: the Case of a 17 British Warship and 10 Tonnes of Gold Coins," *Marine Policy*, 28 (2004): 189.

<sup>14</sup> The RMS *Titanic* was found in waters 4,000 meters in depth. See Robert Ballard. *The Discovery of the Titanic* (London: Guild Publishing, 1987). See Dromgoole, "Murky Waters for Government Policy: the Case of a 17 British Warship and 10 Tonnes of Gold Coins," 189, who notes that it is now possible to "locate and recover material from 98% of the ocean floors of the world using modern technology" citing O'Hara E. *Maritime and Fluvial Cultural Heritage*, Report of the Committee on Culture and Education, Parliamentary Assembly of the Council of Europe Doc. 8867, 12 October 2000; para. 3.4.3.

<sup>15</sup> Craig Forrest, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage," *Melbourne Journal of International Law*, 4 (2003): 595.

artifacts being an integral link to the past should be regarded as part of humanity's common collective cultural heritage and should be protected as such.<sup>16</sup> This is the reason why protection and preservation of UCH is at the core of the UCH Convention.<sup>17</sup> The fact that most of the UCH lies in areas outside of national jurisdiction,<sup>18</sup> renders the need for an international agreement that will protect UCH wherever it may be located more acute.<sup>19</sup>

In sum, the underlying basis for the UCH Convention can be distilled as a reflection and reaction of the international community to three distinct factors. The **first** is the recognition that the recent advances in technology have made UCH increasingly accessible. The **second** is the increasing awareness that UCH, more than just being an economic resource, are more importantly an invaluable cultural, historical and archeological resource. The **last** is the apparent absence of a clear protective regime governing UCH under international law.<sup>20</sup>

## 2.2. Theoretical Antecedents of the UCH Convention

It must be noted that even prior to the adoption of the UCH Convention, the protection of cultural heritage in general was embodied in a considerable number of disparate international instruments.<sup>21</sup> In fact, the definition of cultural

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<sup>16</sup> Lawrence J. Kahn, "Sunken Treasures: Conflicts between Historic Preservation Law and the Maritime Law of Finds," *Tulane Environmental Law Journal*, 7 (1994): 595.

<sup>17</sup> Article 2, UCH Convention; in particular, Article 2(3): "States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of the Convention."

<sup>18</sup> L. H. Van Meurs, *Legal Aspects of Marine Archeological Research* (Institute of Marine Law, University of Cape Town, 1985), 7, 13; Tullio Scovazzi, "A Contradictory and Counterproductive Regime" in Garabello and Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 7.

<sup>19</sup> Patty Gerstenblith, Symposium Ownership and Protection of Heritage: Cultural Property Rights for the 21<sup>st</sup> Century, "The Public Interest in the Restitution of Cultural Objects," *Connecticut Journal of International Law*, 16 (2001): 197.

<sup>20</sup> K. Russel Lamotte, "Introductory Note to UNESCO: Convention on the Protection of the Underwater Cultural Heritage" 41 ILM 37 (2002); Etienne Clément, "Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage: Presentation Made at the First and the Second National Maritime Museum Conferences on the Protection of Underwater Cultural Heritage (Greenwich, 3 and 4 February 1995) (London, IMO, 25 and 26 January 1996)," *Marine Policy*, 20 (1996): 309.

<sup>21</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1972), the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (1956), the UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968), the UNESCO Recommendation for the Protection of Movable Cultural Property (1978), UN General Assembly Resolutions on the Return or Restitution of Cultural Property to the Countries of Origin. For a discussion of international and regional



property in some of these instruments was broad enough to include UCH.<sup>22</sup> In addition to international agreements, there were also a considerable number of regional agreements that addressed the need to protect cultural heritage in general.<sup>23</sup> These regional instruments are by and large European in origin and scope. It is thus not surprising that the earlier international and regional instruments protecting UCH, are also from Europe.<sup>24</sup> The UCH Convention traces its own legislative history from these regional initiatives.

However, the greatest impetus in the development of the UCH Convention as already hinted briefly above is the LOSC itself. The LOSC, widely referred to as the “constitution of the oceans,” was a product of a precarious balancing of interests. The final text of the LOSC consisted of 320 articles and nine annexes, which covered virtually every topic of importance to coastal and maritime states. Out of this number, UCH is only covered in two articles: Articles 149 and 303.

These two provisions, which provide the only substantive international law relating to UCH in international waters, were obviously left vague and ambiguous. The sheer breadth and scope of the matters covered in the LOSC and the “consensus approach” adopted throughout the negotiations, which spanned almost a decade, relegated the issue of the UCH to one of seemingly minor importance compared to the major issues of the Third LOS Conference.<sup>25</sup> The issue of the UCH figured in the debates but was sacrificed in order that consensus may be reached. The criticisms hurled against the protective regime afforded to UCH enshrined in the LOSC as being inadequate or ambiguous must be viewed in this light.

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instruments protecting cultural heritage, see Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, 1995), 70 -101.

<sup>22</sup> For example, see Article 1, UNESCO 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); also Article 2, UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (1956); among others. Strati, *ibid.* 71, 73. See also Theresa Papademetriou, “International Aspects of Cultural Property,” *International Journal of Legal Information*, 24 (1996): 270.

<sup>23</sup> Among which are: the European Cultural Convention (1974); the European Convention on the Protection of the Archeological Heritage (1969); the European Convention on Offences relating to Cultural Property (1985); the Convention for the Protection of the Architectural Heritage of Europe (1985); the European Convention on the Protection of the Archeological Heritage (revised) (1992). For a discussion of these Conventions and their relation to the UCH Convention, see Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, 1995), 69 – 101.

<sup>24</sup> For example, the Protocol concerning Mediterranean Specially Protected Areas (1982); Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage; the Draft European Convention on the Protection of the Underwater Cultural Heritage (1985). *Ibid.*

<sup>25</sup> See generally, Robin Churchill and Alan Lowe, *The Law of the Sea* (Great Britain, 1999), 13-22.



The two LOSC Articles likewise embody general principles of international law: first, that States have the duty to protect UCH in the different maritime zones; second, that this duty is undertaken for the benefit of humanity; and lastly, every State has the duty to cooperate in the fulfillment of these duties. These principles constitute the very foundation of the UCH Convention itself.

The question, thus, is not one of coverage or mere inclusion in an international legal instrument. The proper question should be phrased, thence: Is the protection and preservation of UCH under international law adequate?<sup>26</sup>

It was apparent that the international legal framework on the protection of underwater cultural heritage was inadequate. It was fragmented, ambiguous, and lacks the mechanism for enforcement.<sup>27</sup>

### 2.3. Historical antecedents of the UCH Convention

The legislative history of the UCH Convention is not quite as protracted, nor as complex as the LOSC.<sup>28</sup> The international recognition for the need to formulate an international instrument that will afford protection specifically to UCH was first formally embodied in a 1978 Council of Europe Recommendation.<sup>29</sup> A Draft European Convention on the Protection of the Underwater Cultural Heritage<sup>30</sup> was finalized in 1985 and submitted to the Committee of Ministers for approval but was not opened for signature due to the objection of Turkey to the territorial scope of application.

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<sup>26</sup> Lauren W. Blatt, "SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?" *Emory International Law Review* 14 (2000): 1581.

<sup>27</sup> Craig Forrest, "Historic Wreck Salvage: An International Perspective," *Tulane Maritime Law Journal*, 33 (2009): 368.

<sup>28</sup> Roberta Garabello, "The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage" in Roberta Garabello and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 89 – 192; Patrick J. O'Keefe, "Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention," *Marine Policy* 20 (1996): 297; Espósito and Fraile, in *Bringing New Law to Ocean Waters*, cited above.

<sup>29</sup> See Council of Europe Recommendation 848 (1978) on the Underwater Cultural Heritage (Doc. 4200, Strasbourg) as cited in Sarah Dromgoole, "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage," 18 *International Journal of Marine and Coastal Law* 18 (2003): 60. This was the first attempt to establish regional principles on the protection of underwater cultural heritage and to address the jurisdictional issue of coastal state jurisdiction over underwater cultural heritage. See discussion of Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, 1995), 85-87.

<sup>30</sup> Draft European Convention on the Protection of the Underwater Cultural Heritage, Doc. CAHAQ (85) 5.

In 1988, the International Law Association (ILA)<sup>31</sup> formed a Committee on Cultural Heritage Law which reviewed the protection regime of UCH in international waters and concluded that a convention was needed to address the gaps in the LOSC. The same ILA Committee prepared a Draft Convention on the Protection of the Underwater Cultural Heritage. The ILA adopted the draft in a plenary session in Buenos Aires in 1994 and submitted the same to the UNESCO for consideration. In 1996 the International Council of Monuments and Sites (ICOMOS)<sup>32</sup> adopted the International Charter on the Protection and Management of Underwater Cultural Heritage which sets the benchmark standards for underwater archeology. The ICOMOS Charter was included in the ILA Draft as an annex.

In 1993 a feasibility study was conducted by UNESCO to consider the option of adopting a new international convention on UCH.<sup>33</sup> In the process of preparing the feasibility study, it became apparent that while the ILA Draft was useful, it was inadequate and needed substantial revisions. In a Meeting of Experts in May 1996<sup>34</sup>, the need for a convention was unanimously recognized.

In 1997, at the 29th session the UNESCO General Conference, it was decided that the protection of the UCH should be regulated at the international level by an international convention. The Director-General was invited to convene a group of governmental experts for this purpose.<sup>35</sup> On the basis of the ILA draft, UNESCO prepared a preliminary draft text in 1998.<sup>36</sup>

From 1998 until 2001, four Open-ended Meetings of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage were conducted. The UNESCO Draft was discussed at the first and

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<sup>31</sup> The International Law Association, founded in Brussels in 1873, has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies. Its objectives, under its Constitution, include the "study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill". Online: [www.ila-hq.org](http://www.ila-hq.org).

<sup>32</sup> The ICOMOS, established in 1964, is a non-governmental organization with special observer status at UNESCO, and whose primary function is to advise intergovernmental organizations of the steps necessary to conserve the monuments and sites of the world. Online: [www.icomos.org](http://www.icomos.org).

<sup>33</sup> Doc. 141 EX/18 Paris, 23 Mar 1993, Resolution 5.5.1 para 20. *See also* UNESCO Secretariat, "Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage", presented to the 146<sup>th</sup> Session of the UNESCO Executive Board, Paris, 23 March 1995, Doc. 146 EX/27, para. 19 on the question of whether UNESCO was the appropriate body to take action on the matter, as cited in Dromgoole, "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage," 61.

<sup>34</sup> CLT-96/CONF.605/6 Paris, 22-24 May 1996.

<sup>35</sup> Doc. 29C/Resolution 21

<sup>36</sup> Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage. Doc. CLT-96/CONF.202/5, April 1998.

second meetings of governmental experts, in June/July 1998<sup>37</sup> and April 1999<sup>38</sup>, respectively. Out of these meetings, a revised draft was produced which embodied the discussion and debates during the negotiations and which formed the basis for discussion during the subsequent third and fourth governmental experts meetings in July 2000<sup>39</sup> and March/April 2001.<sup>40</sup>

The UNESCO Director-General made it clear that this would be the last meeting before the text was finalized.<sup>41</sup> However, failure to reach an agreement necessitated an extension of the session in July 2001<sup>42</sup> where the pressure to produce the finalized text mounted.<sup>43</sup> Eventually, a draft was finally agreed upon which was adopted by the General Conference on 2 November 2001.

### **3. The UNESCO Convention on the Protection of the Underwater Cultural Heritage: an outline of main provisions**

The UCH Convention consists of 35 articles and an Annex with 36 rules. Although it is undeniably complex, the technical nature of the UCH Convention hardly shielded it from dealing with the most delicate political and legal issues. The grueling negotiations that spanned a decade resonated and resurrected old debates and tensions during the Law of the Sea Conferences.<sup>44</sup> In addition, during the drafting of the UCH Convention, new dividing lines were created, with

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<sup>37</sup> The first meeting, UNESCO Headquarters, 29 June to 2 July (Report Doc. CLT-98/CONF. 202/7).

<sup>38</sup> The second meeting, UNESCO Headquarters, 19 to 24 April (Report Doc. CLT-99/CONF. 204). During this meeting, general agreement was reached to incorporate in an Annex, as an integral part of the draft convention, the Principles set forth in the 1996 ICOMOS Charter.

<sup>39</sup> The third meeting, UNESCO Headquarters, 3 to 7 July (Report Doc. CLT-2000/CONF. 201/7) to study the revised draft (Doc. CLT-96/CONF. 202/5 Rev. 2). Despite much progress, the Convention text was not finalized.

<sup>40</sup> The first session of the fourth meeting, UNESCO Headquarters, 26 March to 6 April. The Director-General proposed an extension to allow for further consultations regarding certain matters still under discussion.

<sup>41</sup> Patrick O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (London, 2002), 30.

<sup>42</sup> The second session of the fourth meeting, UNESCO Headquarters, 2 to 7 July. The draft text was approved by 49 votes in favour, 4 against and 8 abstentions.

<sup>43</sup> At this last meeting, the Chairman, Mr. Carsten Lund of Denmark, produced a Single Negotiating Text which was the focus of fierce debates. See Roberta Garabello, "The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage" in Roberta Garabello and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 91.

<sup>44</sup> Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, Netherlands: Kluwer Law International, 1995) 99, 117 – 121; Deirdre O'Shea, "The Evolution of Maritime Historic Preservation Jurisprudence," *Widener Law Symposium Journal* 8 (2002): 417.

diagonally opposing values and conflicting positions. The perfect example of this would be the divergent perspectives on UCH by the archeological community and the treasure salvage community.<sup>45</sup>

The UCH Convention was created against this turbulent backdrop.<sup>46</sup> This section will aim at providing an overview of the main provisions of the UCH Convention by: **first**, identifying some of the salient provisions of the UCH Convention without further elaborating on them;<sup>47</sup> and **second**, defining UCH as used in the UCH Convention.

### 3.1. The UCH Convention: salient provisions

The aim of the UCH Convention is succinct and clear: “to ensure and strengthen the protection of underwater cultural heritage”<sup>48</sup> for the benefit of humanity.<sup>49</sup> In order to achieve this objective, the UCH Convention imposes upon states parties the duty to cooperate<sup>50</sup> and to take all necessary and appropriate measures in conformity with the UCH Convention and with international law in order to protect UCH using the best practicable means at their disposal and in accordance with their capabilities.<sup>51</sup>

The UCH Convention prohibits the commercial exploitation of UCH.<sup>52</sup> As such, UCH are not allowed to be “traded, sold, bought or bartered as commercial goods.”<sup>53</sup> States Parties have the obligation to take measures to prevent the entry into their territory, the dealing and possession of illicitly exported and/or recovered underwater cultural heritage.<sup>54</sup>

The UCH Convention requires that recovered UCH shall be deposited, conserved and managed in a manner that ensures its long-term preservation.<sup>55</sup> This is keeping with the perspective of the UCH Convention that preservation *in situ* of UCH should be considered the first option before allowing or engaging in

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<sup>45</sup> Paul Fletcher-Tomenius and Craig Forrest, “Historic Wreck in International Waters: Conflict or Consensus?,” *Marine Policy* 24 (2000): 1.

<sup>46</sup> Janet Blake, “The Protection of the Underwater Cultural Heritage,” *International and Comparative Law Quarterly* 45 (1996): 819.

<sup>47</sup> While it is to be expected that this paper will not be able to cover all the substantive provisions of the UCH Convention, an attempt will be made to at least identify them. Furthermore, the cursory discussion in this section will be supplemented with an analysis, nay a modest critique, in the latter part of this paper which will tackle the corresponding issues that these contentious raise.

<sup>48</sup> Article 2 (1), UCH Convention.

<sup>49</sup> Article 2 (3), UCH Convention.

<sup>50</sup> Article 2 (2), UCH Convention.

<sup>51</sup> Article 2 (4), UCH Convention.

<sup>52</sup> Article 2 (7), UCH Convention; Rule 2 of the Annex.

<sup>53</sup> Rule 2 of the Annex.

<sup>54</sup> Article 14, UCH Convention.

<sup>55</sup> Article 2 (6), UCH Convention.

any activities directed at this heritage.<sup>56</sup> Towards this end, the UCH Convention encourages responsible non-intrusive access to observe or document *in situ* UCH in order to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.<sup>57</sup> It also ensures that activities directed at UCH must use non-destructive techniques and survey methods in preference to recovery of objects.<sup>58</sup> The UCH Convention requires that prior to any activity, a project design for the activity shall be developed and approved by the competent authorities.<sup>59</sup>

The UCH Convention recognizes the rules of international law and State practice pertaining to sovereign immunities, as well the rights of States with respect to State vessels and aircraft and does not seek to modify these rules, including the provisions of the LOSC.<sup>60</sup> In this respect, States parties have the duty to ensure that proper respect is given to all human remains located in maritime waters<sup>61</sup> and activities directed at UCH shall avoid the unnecessary disturbance of human remains or venerated sites.<sup>62</sup> The UCH Convention accords special treatment for warships and other government ships or military aircraft with sovereign immunity.<sup>63</sup>

The UCH Convention states that any activity relating to UCH to which the Convention applies shall not be subject to the law of salvage or law of finds, unless such is authorized by the competent authorities, is in full conformity with the Convention, and ensures that any recovery of the underwater cultural heritage achieves its maximum protection.<sup>64</sup>

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<sup>56</sup> Article 2 (5), UCH Convention; Rule 1 of the Annex. See discussion in Luigi Migliorino, "In Situ Protection of the Underwater Cultural Heritage International Treaties and National Legislation," *International Journal of Marine and Coastal Law* 10 (1995): 483; Geoffrey Brice, "Salvage and the Underwater Cultural Heritage," *Marine Policy* 20 (1996): 337.

<sup>57</sup> Article 2 (10), UCH Convention; Rules 7 and 8 of the Annex.

<sup>58</sup> Rule 4 of the Annex.

<sup>59</sup> Rules 9-16 of the Annex; James A. R. Nafziger, "The Titanic Revisited," *Journal of Maritime Law and Commerce*, 30 (1999): 311.

<sup>60</sup> Article 2 (8), UCH Convention.

<sup>61</sup> Article 2 (11), UCH Convention.

<sup>62</sup> Rule 5 of the Annex, Jason R. Harris, "The Protection of Sunken Warships as Gravesites at Sea," *Ocean and Coastal Law Journal*, 7 (2001): 75.

<sup>63</sup> Article 13 in relation to Articles 9, 10, 11, and 12, UCH Convention.

<sup>64</sup> Article 4, UCH Convention. See Tullio Scovazzi, "The Application of 'Salvage Law and other Rules of Admiralty' to the Underwater Cultural Heritage: Some Relevant Cases" in Roberta Garaballo and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 19 – 80. Article 4, which excludes any activity relating to UCH from the law of salvage and the law of finds, should be read in relation with Article 2 (7) and Rule 2 of the Annex which forbids the commercial exploitation of UCH. This can also be read in light of Article 2 (5) and Rule 1 of the Annex, which considers *in situ* preservation as the first option for the protection of UCH. Salvors oppose this view and argue that objects underwater are subject to marine peril and eventual destruction, and should be recovered.

The UCH Convention promotes training in underwater archaeology, the transfer of technologies and information sharing and the need to raise public awareness in the value and significance of UCH.<sup>65</sup>

The UCH Convention devoted separate provisions for the protective regimes that will apply to UCH in internal waters, archipelagic waters and the territorial sea;<sup>66</sup> in the contiguous zone;<sup>67</sup> in the exclusive economic zone (EEZ) and on the continental shelf;<sup>68</sup> and in the Area.<sup>69</sup> These will all be discussed in detail below.

### **3.2. Defining “underwater cultural heritage”**

The entire protective regime of the UCH Convention is anchored on its definition of which objects shall be covered within its mantle of protection. The UCH Convention defines underwater cultural heritage as:

- (a) ... all traces of human existence having a cultural, historical or archeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as:
  - (i) sites, structures, building, artifacts and human remains, together with their archeological a natural context;
  - (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archeological and natural context; and
  - (iii) objects of prehistoric character.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.

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<sup>65</sup> Articles 19 – 21, UCH Convention. See Marilyn Phelan and Marion P. Forsyth, “A Comprehensive Regime for the Protection of Underwater Cultural Heritage” in Jennifer R. Richman and Marion P. Forsyth, *Legal Perspectives on Cultural Resources* (United States, 2004), 119 – 139.

<sup>66</sup> Article 7, UCH Convention.

<sup>67</sup> Article 8, UCH Convention.

<sup>68</sup> Articles 9 and 10, UCH Convention.

<sup>69</sup> Articles 11 and 12, UCH Convention.



(c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.<sup>70</sup>

The UCH Convention definition is clearly broad in scope. The definition contains an expansive inclusion<sup>71</sup> and clear exclusions.<sup>72</sup> The definition merely imposes two requirements: the first is one of location; and the second is one of time. Thus, object must be found underwater, whether partially or totally; and for a period of at least 100 years. The phrase “*all traces of human existence having a cultural, historical or archeological character*”<sup>73</sup> is so broad that it appears, in its ordinary signification, to cover any and all objects that provide any link of human intervention. There also appears no significance test. The wording used was merely one of “character.”

This is one of the most contentious provisions in the UCH Convention. The debate goes beyond mere semantics and the issue is real and complex.<sup>74</sup> The literature is also equally divided on this matter.<sup>75</sup> The interpretation of the phrase, though clearly worded, appears to be subject to dispute. This issue will be more extensively treated below.

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<sup>70</sup> Article 1, UCH Convention.

<sup>71</sup> Article 1 (a), UCH Convention.

<sup>72</sup> Article 1 (b)(c), UCH Convention.

<sup>73</sup> Article 1 (a), UCH Convention. Italics supplied.

<sup>74</sup> See for example, Craig Forrest, “Defining Underwater Cultural Heritage,” *The Journal of Nautical Archeology* 3 (2002): 3.

<sup>75</sup> See for example, Craig Forrest, “A New International Regime for the Protection of Underwater Cultural Heritage,” *International Comparative Law Quarterly* 51 (2002): 523-524; but see Sarah Dromgoole, “2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage,” *International Journal of Marine and Coastal Law* 18 (2003): 64. See especially, David J. Bederman, “The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal,” *Journal of Maritime Law and Commerce* 30 (1998): 331. See also David J. Bederman, “The UNESCO Convention on Underwater Cultural Heritage: Panacea or Peril for Resource Managers?” in Jennifer R. Richman and Marion P. Forsyth, *Legal Perspectives on Cultural Resources* (United States: Altamira Press, 2004), 143-145. Forrest thinks that the interpretation of this provision is not clear; Dromgoole believes that the definition in the UCH Convention embodies a “significance criterion” while Bederman strongly argues that the “outlandish” definition is so expansive to be interpreted as including “a splintered surfboard or even a soda can.” For an in-depth discussion on the negotiating history of this provision, see Roberta Garabello, “The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage” in Roberta Garabello and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 100 – 109.



#### 4. The international legal framework on the protection of the underwater cultural heritage

The division of ocean space into the various maritime zones provided for under the LOSC Convention correspondingly necessitates that any meaningful discussion on the international legal framework on the protection of the UCH must account for this division. The LOSC makes reference to six maritime zones: internal waters,<sup>76</sup> the territorial sea,<sup>77</sup> the contiguous zone,<sup>78</sup> the exclusive economic zone,<sup>79</sup> the continental shelf,<sup>80</sup> and the Area.<sup>81</sup> The LOSC carefully laid out the various rights and duties of states in each of these zones. The UCH Convention follows this schematic dissection of the ocean into the various maritime zones of jurisdiction.

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<sup>76</sup> Internal waters are located on the landward side of the baseline of the territorial sea (Article 8, par. 1, LOSC). The normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State (Article 5, LOSC).

<sup>77</sup> The territorial sea is the area of sea adjacent to a coastal State over which its sovereignty is exercised subject to letting foreign ships pass (rule of innocent passage). Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines (Article 3, LOSC).

<sup>78</sup> The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal State may exercise the control in the contiguous zone necessary to prevent infringement of its customs, fiscal, immigration or sanitary rules and regulations (Article 33, LOSC). According to Article 303, par. 2, of the LOSC, the coastal State may presume that the removal of objects of an archaeological and historical nature from the seabed in the zone without its approval would result in an infringement within its territory or territorial sea of its laws and regulations.

<sup>79</sup> The exclusive economic zone is an area beyond and adjacent to the territorial sea and shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (Articles 55 and 57, LOSC).

<sup>80</sup> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 76, par. 1, LOSC).

<sup>81</sup> The “Area” means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (Article 1, par. 1, LOSC). The Area and all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the seabed, including polymetallic nodules, are “common heritage of mankind” (Article 136, LOSC). Furthermore, according to Article 149, of the LOSC, all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. The high seas comprise all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (Article 86, LOSC).

This part of the paper aims to: **first**, describe broadly the legal regime of protection within the LOSC; and **second**, to describe in greater detail the legal regime within the UCH Convention.

#### **4.1. The protection regime under the LOSC**

The protective regime afforded to UCH within the framework of the LOSC can be summarized as: **first**, insufficient in scope; **second**, ambiguous in content; and **third**, ineffective in its protection. The LOSC, the only substantive piece of international legislation relating to UCH in international waters, contains only two provisions on UCH: Articles 149 and 303.<sup>82</sup>

#### **Jurisdiction with regard to archaeological and historical objects found at sea under the LOSC**

Article 149 of the LOSC provides that:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Article 303 of the LOSC states that:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic on such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws or practices with respect to cultural heritage.

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<sup>82</sup> Moritaka Hayashi, "Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea," *Marine Policy*, 20 (1996): 291.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

These provisions have been the subject of much criticism. The articles are fraught with ambiguity, obscurities and contradiction. The provisions do not define what constitutes objects of an archaeological and historical nature; neither can the definition be found elsewhere in the LOSC. The above provisions merely speak of UCH in the contiguous zone and in the Area, thus, creating a legal vacuum on the status and protection of UCH found in the EEZ and on the continental shelf.

Article 149 does not specify the manner by which the objects of an archaeological and historical nature will be preserved and disposed and what mechanisms will be instituted in order to ensure that such redounds to the “benefit of mankind as a whole.” The same article failed to designate an appropriate body to implement its provisions.<sup>83</sup> The article merely mentions archaeological and historical objects *found* in the Area. It is not clear whether this regime governs the right to search for such objects and are such activities still carried out for the benefit of mankind. If such activities are indeed carried out for the benefit of mankind, why are the law of salvage and the other rules of admiralty, which are evidently for private, commercial gain, given pre-eminent status in Article 303(3)? There is likewise the failure to clarify what the LOSC means when it speaks of the laws of salvage and admiralty.<sup>84</sup> These are just some of the many flaws of the LOSC provisions on UCH.

In sum, it is clear that the protection regime under the LOSC leaves much to be desired in substance or content; as well as in effectiveness; thus, the need for a better regime. Principally, this is what the protection regime under the UCH Convention addresses.

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<sup>83</sup> Although Article 149 pertains to the Area, the International Seabed Authority (ISA) does not enjoy jurisdictional powers over archaeological and historical objects. The LOSC in Article 157 (2) states that the ISA “shall have such incidental powers consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.” But “activities in the Area” are confined to mineral resource exploration and exploitation according to Article 1 (3) of the LOSC. *See also* Article 133(a) and 147 of the LOSC which define resources and other activities in the marine environment, respectively. *See Anastasia Strati, The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague, 1995), 300 – 306.

<sup>84</sup> *See* James A. R. Nafziger, “Historic Salvage Law Revisited,” *Ocean Development and International Law* 31 (2000): 81; Joseph C. Sweeney, “An Overview of Commercial Salvage Principles in the Context of Marine Archaeology,” *Journal of Marine Law and Commerce*, 30 (1999): 185; Ole Varmer, “The Case against the ‘Salvage’ of the Cultural Heritage,” *Journal of Marine Law and Commerce*, 30 (1999): 279.

## 4.2. The protection regime under the UCH Convention

The UCH Convention, mindful of the gaps, flaws, and criticisms in the LOSC, addressed these issues. This section will provide a detailed discussion of the protection regime afforded to UCH within the various maritime zones provided for in the LOSC: internal waters, archipelagic waters and territorial sea; the contiguous zone; the exclusive economic zone and the continental shelf; and the Area.<sup>85</sup>

### 4.2.1. UCH in Internal Waters, Archipelagic Waters and Territorial Sea

The UCH Convention recognizes the absolute right of a State, in the exercise of its sovereignty, to have the “exclusive right to regulate and authorize activities directed at UCH in their internal waters, archipelagic waters and territorial sea.”<sup>86</sup> However, the UCH Convention imposes upon the coastal state twin duties: first, to apply the Rules<sup>87</sup> to activities directed at UCH;<sup>88</sup> and second, to inform the flag State which is a party to the UCH Convention, and in certain instances, other States with a verifiable link,<sup>89</sup> with respect to the discovery of the identifiable state vessel or aircraft.<sup>90</sup>

This reflects and preserves the same balance between the interests of the coastal States and the flag States that permeates the entire of the LOSC. This is clearly a compromise provision. The language of the UCH, however, is very strongly worded such that the duty imposed upon the coastal State is unmistakable. The UCH Convention states that the “States Parties *shall* require that the Rules be applied to activities directed at underwater cultural heritage...”<sup>91</sup> and that “State Parties ... *should* inform the flag State Party to this Convention, and if applicable, other States with a verifiable link.”<sup>92</sup>

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<sup>85</sup> Guido Carducci, “New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage,” *American Journal of International Law*, 96 (2002): 428 - 433.

<sup>86</sup> Article, 7 (1), UCH Convention.

<sup>87</sup> Rules Concerning Activities Directed at Underwater Cultural Heritage, attached as an Annex to the UCH Convention.

<sup>88</sup> Article 7 (2), UCH Convention.

<sup>89</sup> The UCH Convention does not explicitly defines a “verifiable link”, but illustrates it, *inter alia*, as “a cultural, historical or archeological link” with respect to the identifiable State vessel or aircraft. See, for example, references in Articles 6 (3), 7 (3), 9 (5), 11(4), among others.

<sup>90</sup> Article 7(3), UCH Convention.

<sup>91</sup> Article 7 (2), UCH Convention.

<sup>92</sup> Article 7 (3), UCH Convention.

There was considerable debate during the negotiations of this particular provision.<sup>93</sup> However, the UCH Convention couches this duty “with a view to cooperating on the best methods of protecting State vessels and aircraft”<sup>94</sup> and does not apply to internal waters. This provision also echoes the duty of States parties to cooperate in the protection of UCH.<sup>95</sup>

#### **4.2.2. UCH in the Contiguous Zone**

The UCH Convention<sup>96</sup> not only complements the protective regime provided in the LOSC<sup>97</sup> for UCH in the contiguous zone, more importantly it expands and improves the mantle of protection. First, the UCH Convention extends the protective scope (*ratione materiae*). The UCH Convention gives the coastal State the right to regulate and authorize activities directed at UCH within their contiguous zone. In contrast, Article 303 (2) of the LOSC merely covers the unauthorized removal of UCH in view of the coastal State’s control of traffic in such objects. The expansive wording of the UCH Convention gives the coastal State the right to regulate and authorize activities beyond the mere removal of UCH. Secondly, the requirement for the coastal State to apply the Rules to activities directed at UCH in the contiguous zone likewise establishes uniformity.

#### **4.2.3. UCH in the EEZ and on the Continental Shelf**

It must be remembered that the LOSC does not contain any provision on the protection of UCH in the EEZ or on the continental shelf. The UCH addresses this gap in the law by imposing upon states the responsibility to protect UCH in the EEZ and on the continental shelf in conformity with the UCH Convention.<sup>98</sup>

The UCH Convention imposes upon all States parties two obligations. First, a State Party shall require that when its national, or a vessel flying its flag,

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<sup>93</sup> Although widely regarded as a compromise, it may reasonably be an obstacle for the ratification of some States. This provision should be read in light of the debate regarding the legal status of sunken warships and its collateral issues of the definition of abandonment as well as flag state jurisdiction. David J. Bederman, “The UNESCO Convention on Underwater Cultural Heritage: Panacea or Peril for Resource Managers?” in Jennifer R. Richman and Marion P. Forsyth, *Legal Perspectives on Cultural Resources* (United States, 2004), 148, predicts that this provision can potentially be the greatest source of conflict in the entire UCH Convention.

<sup>94</sup> *Ibid.*

<sup>95</sup> Article 2 (2), UCH Convention.

<sup>96</sup> Article 8, UCH Convention.

<sup>97</sup> Article 303 (3), LOSC.

<sup>98</sup> Article 9 (1), UCH Convention. The expansive protective regime for UCH in the EEZ and on the continental shelf is further enhanced by the UCH Convention by the institution of two regimes: the information regime, through the system of reporting and notification under Article 9; and the protection regime, under Article 10.

discovers or intends to engage in activities directed at underwater cultural heritage located in its EEZ or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it.<sup>99</sup> Second, if the discovery or the intention to engage in activities directed at UCH in the EEZ or continental shelf of another State Party, States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party.<sup>100</sup> Alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.<sup>101</sup> On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted.<sup>102</sup>

The UCH Convention aims in establishing a global information scheme by imposing upon all States parties the duty to notify the Director-General of the UNESCO of discoveries and activities reported to it.<sup>103</sup> The Director-General of UNESCO is likewise imposed the duty to promptly notify all States parties of any information notified to him.<sup>104</sup>

The protection regime applicable to UCH in the EEZ and on the continental shelf under the UCH Convention gives a State party in whose EEZ or on whose continental shelf UCH is located the right to prohibit or authorize any activity directed at such UCH so as to prevent or interfere with the coastal State's sovereign rights or jurisdiction as provided for by international law including the LOSC.<sup>105</sup> This right is not found in the LOSC. This is an innovative expansion of the rights of the coastal states although circumscribed by the limitation that these activities directed at UCH located in the EEZ or on the continental shelf will only fall within the purview of the right if they interfere with a coastal state's "sovereign rights or jurisdiction." Within the framework of the LOSC<sup>106</sup> alone, this can interpreted liberally to include such activities as jurisdiction over marine scientific research and preservation of the marine environment in the EEZ;<sup>107</sup> sovereign rights for the purposes of exploring and exploiting the natural resources

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<sup>99</sup> Article 9 (1) (a), UCH Convention.

<sup>100</sup> Article 9 (1)(b) (i), UCH Convention.

<sup>101</sup> Article 9 (1)(b) (ii), UCH Convention.

<sup>102</sup> Article 9 (2), UCH Convention.

<sup>103</sup> Article 9 (3), UCH Convention.

<sup>104</sup> Article 9 (4), UCH Convention.

<sup>105</sup> Article 10 (2), UCH Convention.

<sup>106</sup> Article 10 (2) of the UCH Convention states that "as provided for by international law including the United Nations Convention on the Law of the Sea." Thus, the range of activities directed at UCH in the EEZ and on the continental shelf is definitely broader and the examples that are listed above are merely illustrative.

<sup>107</sup> Article 56 (1) (b), LOSC. This includes jurisdiction over the establishment and use of artificial islands, installations and structures.



in the EEZ and the continental shelf;<sup>108</sup> among others. Of course, conversely, the right of the coastal state to authorize any activity directed at UCH located within its EEZ or on its continental shelf must be in conformity with the provisions of the UCH Convention.<sup>109</sup>

In instances where the discovery of UCH or activities directed at UCH in the EEZ and on the continental shelf do not interfere with the sovereign rights of the coastal State, the UCH Convention imposes upon that State party the duty to consult all other States Parties which have declared an interest<sup>110</sup> on how best to protect the underwater cultural heritage.<sup>111</sup> The coastal State coordinates such consultations as a “Coordinating State”, unless it expressly declares that it does not wish to do so.<sup>112</sup> In such an instance, the States Parties which have declared an interest<sup>113</sup> shall appoint a Coordinating State.<sup>114</sup> This principle is in harmony with that contained in the LOSC in Article 149.<sup>115</sup>

The UCH Convention accords the Coordinating State the right to take all practicable measures, and/or issue any necessary authorizations<sup>116</sup> to prevent any immediate danger to the UCH, whether arising from human activities or any other cause, including looting. This is of course, without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage.<sup>117</sup> In taking such measures, the Coordinating State may request assistance from other States Parties.<sup>118</sup>

The UCH stresses that the Coordinating State acts on behalf of the States Parties as a whole and not in its own interest and any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not

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<sup>108</sup> Articles 56, 77, LOSC Convention.

<sup>109</sup> In particular, as specified by the UCH Convention, in conformity with the provisions of Article 10.

<sup>110</sup> Under Article 9 (5), UCH Convention; i.e., a declaration based a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

<sup>111</sup> Article 10 (3) (a), UCH Convention.

<sup>112</sup> Article 10 (3) (b), UCH Convention.

<sup>113</sup> Under Article 9 (5), UCH Convention.

<sup>114</sup> Article 10 (3) (b), UCH Convention.

<sup>115</sup> The LOSC in Article 149, which only applies to the Area, also recognizes this preferential right of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. This is the reason why no similar provision is included on the protection regime pertaining to the UCH in the EEZ and on the continental shelf.

<sup>116</sup> Article 10 (4), UCH Convention, i.e., “in conformity with this Convention and, if necessary prior to consultations” *See also* other duties of the Coordinating State in Article 10 (5), UCH Convention.

<sup>117</sup> Article 10 (4), UCH Convention.

<sup>118</sup> Article 10 (4), UCH Convention.



provided for in international law, including the LOSC.<sup>119</sup> This reinforces the notion that the preservation of UCH, as a central goal of the UCH Convention, is undertaken for the benefit of humanity.<sup>120</sup>

However, as a testimony to the long-standing tension between coastal State jurisdiction and flag State jurisdiction, and the precarious balances that delegates must always seek in order to achieve a compromise, the protection regime afforded to UCH in the EEZ and on the continental shelf is subject to the limitation that the “no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.”<sup>121</sup> This creative solution, included apparently to assuage the concerns of flag States over their vessels or aircrafts within the EEZ or continental shelf of another State’s jurisdiction, is nevertheless subject to the two main provisions of the protection regime. First, that the activities do not interfere with the sovereign rights or jurisdiction of the coastal State; and second, in instances of immediate danger to the UCH.<sup>122</sup>

#### **4.2.4. UCH in the Area**

The protection regime afforded to UCH in the Area<sup>123</sup> under the UCH Convention substantially mirrors the provisions pertaining to UCH in the EEZ and on the continental shelf.<sup>124</sup> The information regime and the protection regime, including the provisions for emergency measures are identical in form and structure. The principal difference is that the function performed by the coastal state is vested on the Director-General of the UNESCO for the information regime and to an appointed state for the protection regime with respect to UCH in the Area.

The UCH Convention imposes the duty upon States Parties to protect underwater cultural heritage in the Area.<sup>125</sup> This entails the two-tiered duty upon a state party to require its national, or the master of the vessel flying its flag, to report a discovery or an intent directed at UCH in the Area;<sup>126</sup> and the state party’s duty to notify the Director-General of the UNESCO and the Secretary-General of the International Seabed Authority of such discoveries or activities

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<sup>119</sup> Article 10 (6), UCH Convention.

<sup>120</sup> Article 2 (3), UCH Convention.

<sup>121</sup> Article 10 (7), UCH Convention.

<sup>122</sup> Article 10 (7) in relation with Article 10 (2) and (4), UCH Convention.

<sup>123</sup> Articles 11 and 12, UCH Convention.

<sup>124</sup> Articles 9 and 10, UCH Convention.

<sup>125</sup> Articles 11 (1) UCH Convention. States Parties have a responsibility to protect UCH in the Area in conformity with the UCH Convention and Article 149 of the LOSC.

<sup>126</sup> Articles 11 (1) UCH Convention

reported to it.<sup>127</sup> The Director-General of the UNESCO shall promptly make available to all States Parties any such information supplied by States Parties.<sup>128</sup>

The protection regime for the Area authorizes the Director-General of the UNESCO to invite all States Parties which have declared an interest<sup>129</sup> to consult on how best to protect the UCH, and to appoint a “Coordinating State”, who shall be the State Party who will coordinate such consultations.<sup>130</sup> The International Seabed Authority shall also be invited to participate in such consultations.<sup>131</sup>

The UCH Convention, in instances where there is an immediate danger to the UCH in the Area whether arising from human activity or any other cause including looting, allows *all* States Parties to take all practicable measures, if necessary, even prior to consultations.<sup>132</sup> Similar to the provision pertaining to the EEZ and the continental shelf, the UCH Convention stresses that in coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations,<sup>133</sup> the Coordinating State acts for the benefit of humanity as a whole, on behalf of all States Parties.<sup>134</sup> However, the UCH Convention accords particular regard to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.<sup>135</sup> The protection regime of UCH in the Area is in accordance with the high seas regime applicable to Area under the LOSC which respects absolute flag state jurisdiction. In this regard, the UCH Convention prohibits a State Party to undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.<sup>136</sup>

## 5. The UCH Convention: promises, issues and concerns

The UCH Convention has been the subject of both strong praise as well as strong criticism.<sup>137</sup> The discussion in this section is aimed at: **first**, identifying the strengths of the UCH Convention; and **second**, providing a critique of the UCH Convention with an analysis of its weaknesses.

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<sup>127</sup> Article 11 (2), UCH Convention

<sup>128</sup> Article 11 (3), UCH Convention.

<sup>129</sup> Under Article 11, paragraph 4, UCH Convention.

<sup>130</sup> Article 12 (2), UCH Convention. *See* Article 12 (4), (5) and (6) for the other duties and limitations to the functions of a Coordinating State.

<sup>131</sup> Article 12 (2), UCH Convention.

<sup>132</sup> Article 12 (3), UCH Convention

<sup>133</sup> Every action must always be in conformity and limited only to those provided under Article 12, UCH Convention.

<sup>134</sup> Article 12 (6), UCH Convention.

<sup>135</sup> *Ibid.*

<sup>136</sup> Article 12 (7), UCH Convention.

<sup>137</sup> David J. Bederman, “The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal,” *Journal of Marine Law and Commerce*, 30 (1998): 331.

## 5.1. Strengths and promises

The main achievements of the UCH Convention can be summarized in two points: **first**, the adoption of the text itself; and **second**, the international recognition of the imperative to preserve and protect underwater cultural heritage.

The UCH Convention is an embodiment of the aspirations of the international community to protect and preserve UCH for the benefit of humanity. It is the first multilateral agreement that specifically addresses this issue. It is a culmination of a decade of arduous negotiations and an attempt to fill-in the gaps within the LOSC framework.<sup>138</sup> The UCH Convention is a compromise text which proceeded from, preserved and maintained the delicate balance of conflicting interests resolved during the negotiations for the LOSC. The very idea of protecting and preserving UCH, even from inception and until the final vote was taken because consensus cannot be achieved, was so embroiled in heavy political and legal debates that many people were skeptical it would even be adopted. For these reasons alone, the UCH Convention must be seen as an immense success. However, albeit clearly in the right direction, the adoption of the UCH Convention is merely a first step.

The second success of the UCH Convention is the fact that it has placed the protection and preservation of UCH in the global agenda. The pioneering role played by the UNESCO, as well as the efforts of the ILA, ICOMOS, the government experts of the states which participated, created a critical mass that produced the UCH Convention. The wide participation of states and other stake holders during the drafting of the UCH Convention proves the growing awareness of the need to preserve this important heritage of humanity.

## 5.2. Issues and concerns

### 5.2.1. The ambiguous and expansive definition of UCH

The UCH Convention defines UCH in Article 1. This definition suffers from being overly broad and vague. The phrase “all traces of human existence having a cultural, historical or archaeological character” is problematic for it fails to provide a both a standard for exclusion and a standard for inclusion. The truth is, in its proper and ordinary signification, it may rightfully be interpreted to include just about anything and everything that is found underwater.

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<sup>138</sup> Richard T. Robol, “Legal Protection for Underwater Cultural Resources: Can We Do Better?,” *Journal of Marine Law and Commerce*, 30 (1999): 303.

Of course, following basic rules of statutory construction, one may be guided by the *travaux préparatoire*, or the transcripts of the negotiations and debate that transpired in drafting this particular provision, to ascertain the intent behind this definition. But the pervasive spirit of absolute preservation and protection of UCH that runs through the entire UCH Convention is guidance enough. The strict prohibitive regime of the UCH Convention which forbids any activities directed at UCH (except in certain specified exceptions, as discussed above) as well as its ban on the commercial exploitation of UCH actually creates a legal presumption. The UCH Convention presumes as UCH an object underwater which satisfies the above criterion and the 100-year period test and will be covered in the expansive mantle of the Convention's protection. These broad criteria likewise ignore the nature of UCH as a multi-use resource.<sup>139</sup> This obvious archaeological bias overlooks the fact that UCH is also a fishery resource and also a sports and recreational resource.<sup>140</sup> The practical consequence of this over-inclusive definition may be to deprive these other users the opportunity to maximize these resources since once they fall under the definition they are automatically taken out of the commerce of men.

### 5.2.2. The elimination of the economic value of UCH

The elimination of the economic value of UCH raises three issues of concern: the **first** is the question of practicability; the **second** is enforceability; and the **third** is effectiveness. The UCH Convention introduces the principle that the preservation and protection of UCH is incompatible with its commercial exploitation. More than this, the UCH Convention seeks to eliminate UCH from commerce. On the one hand, it is seriously doubtful whether this is the most effective means to achieve the aims of the UCH Convention; on the other hand, it may be naïve to even envision that this can be done.

The fact that UCH is a multi-use resource implies that it is not only important archeologically, historically or culturally; it also has an economic value.<sup>141</sup> Shipwrecks supply various kinds of economic values. These are: salvage value - as when cargoes of high monetary value are recovered, so returning them to the 'stream of commerce'; archaeological value - as when the careful investigation of a wreck uncovers interesting historical information; recreation

<sup>139</sup> Hance D. Smith and Alastair D. Couper. "The Management of the Underwater Cultural Heritage," 4 *Journal of Cultural Heritage* 4 (2003): 25; Alastair Couper, "The Principal Issues in Underwater Cultural Heritage," *Marine Policy*, 20 (1996): 283.

<sup>140</sup> Paul Fletcher-Tomenius and Craig Forrest, "Historic Wreck in International Waters: Conflict or Consensus?" *Marine Policy*, 24 (2000): 1.

<sup>141</sup> Gillian Hutchinson. "Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea," *Marine Policy*, 20 (1996): 287.

value - as for hobbyist divers; and reef value - as when a wreck creates an artificial reef as a habitat for fish that may be of value to recreational anglers. The UCH Convention cannot legislate to eliminate this economic value.

On the contrary, it may even invigorate illicit trade, increase global demand of UCH and cause the prices of UCH to sky-rocket.<sup>142</sup> It may prove to be ruinous and achieve the contrary results. Additionally, this principle overly simplifies the varied causes of the destruction of UCH by creating the divide and laying the blame solely on commercial treasure salvors. The oil and gas industry, the pipe-laying industry, unintentional or accidental human acts, and even nature itself are just some of the other culprits.<sup>143</sup>

Moreover, this principle is simply unbalanced public policy. It is argued that there is no substantial reason to differentiate between UCH and their terrestrial counterparts.<sup>144</sup> Furthermore, it is neither good science nor is it cost-effective, to collect multiple artifacts and prohibit their economic utilization. It may be best just to keep a representative sample and dispose of the rest. Otherwise, this also poses an archival problem of preservation and storage.

### **5.2.3. The treatment of sunken state vessels and sovereign immunity issues**

The UCH Convention merely maintains the uncertainty over the issues of abandonment and sovereign immunity of sunken warships. Article 2 (8) of the UCH Convention reflects the complexities of this issue. The negotiating draft initially provided for the exclusion of State vessels in the Convention.<sup>145</sup> This exclusion reflected the view of many maritime nations that states only lose ownership over state-owned vessels by express abandonment.<sup>146</sup> However, since most of these vessels are clearly UCH, it was widely criticized. It was perceived

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<sup>142</sup> Neil Brodie, "Export Deregulation and the Illicit Trade in Archeological Material" in Jennifer R. Richman & Marion P. Forsyth, *Legal Perspectives on Cultural Resources* (United States, 2004), 85 – 99.

<sup>143</sup> See for example, Komurcu, Cultural Heritage Endangered by Large Dams and its Protection under International Law," *Wisconsin International Law Journal*, 20 (2002): 233; Christopher C. Bryant, "The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks," *Albany Law Review*, 65 (2001-2002): 97.

<sup>144</sup> Paul Fletcher-Tomenius and Craig Forrest, "Historic Wreck in International Waters: Conflict or Consensus?" *Marine Policy*, 24 (2000): 3.

<sup>145</sup> The Convention "shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of its sinking, only for government non-commercial purposes." CLT-96/CONF 202/5 Rev 2, Paris, July 1999.

<sup>146</sup> David J. Bederman, "Rethinking the Legal Status of Sunken Warships," *Ocean Development and International Law* 31 (2000): 97; Jeffrey W. Yeates, "Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels," *University of San Francisco Maritime Law Journal*, 12 (1999-2000): 359.

that to allow these vessels to be outside of the purview of protection of the UCH Convention would undermine its very aims.<sup>147</sup>

The qualified inclusion still poses several questions. Among these is the argument that the principle of sovereign immunity of State-owned vessels does not apply to sunken vessels.<sup>148</sup> This is premised on the assertion that sunken vessels cease to be ships and are therefore removed from the exclusive jurisdiction of the flag State. Both the Convention on the High Seas in Article 8 and the LOSC in Article 29 define warships as a “ship belonging to the armed forces of a State bearing external marks ... under the command of an officer duly commissioned by the government... and manned by a crew.”<sup>149</sup> A sunken vessel will definitely not meet any of these criteria. Thus, several commentators argue that when a ship sinks it is no longer entitled to the special preferences and immunities accorded to warships under international law.<sup>150</sup>

Another contentious issue is one of determining the legal status of a state-owned vessel and its consequent issue of ownership. The reasons for these may be varied: the vessel may be too old that it pre-dates the very conception of a ‘State’; or the original flag State is no longer existing, either because it has broken up into many States or coalesced with other States into a another State; or the vessel may simply not allow any historic evidence to determine ownership.<sup>151</sup>

The resulting compromise within the UCH Convention largely reflects and balances this tension between the flag-State and the coastal State in whose maritime zone the vessel may be located. Needless to say, the conflict remains, and a jurisdictional dilemma will still arise, for example if a State-owned vessel happens to be found within the territorial sea of coastal State.<sup>152</sup> The same is true if the State-owned vessel was found in any of the other maritime zones.<sup>153</sup>

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<sup>147</sup> J. Ashley Roach, "Sunken Warships and Military Aircraft," *Marine Policy*, 20 (1996): 351.

<sup>148</sup> See Articles 95 and 96, LOSC.

<sup>149</sup> Article 8, High Seas Convention and Article 29, LOSC.

<sup>150</sup> Jerry E. Walker, "A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations" *University of San Francisco Maritime Law Journal*, 12 (1999-2000): 355; Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage," *International Comparative Law Quarterly* 51 (2002): 527.

<sup>151</sup> See Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage" (2002) 51 I. C. L. Q. 512, at 528. See also David J. Bederman, "Maritime Preservation Law: Old Challenges, New Trends," *Widener Law Symposium Journal* 8 (2002): 163.

<sup>152</sup> See especially Clarissa A. Kang, "Charting Through Protection for Historic Shipwrecks Found in U.S. Territorial Waters: Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels," *Virginia Environmental Law Journal* 19 (2000): 87. See also Jason R. Harris, "Protecting Sunken Warships as Objects Entitled to Sovereign Immunity," *University of Miami Inter-American Law Review*, 33 (2002): 101.

<sup>153</sup> See for example, issues of private ownership claims in Stephen Paul Coolbaugh. Comment. "Raiders of the Lost ... Sub? The Potential for Private Claims of Ownership to Military



#### 5.2.4. Other issues

There are other equally important, critical issues, which, due to limitations of space, will not be covered extensively in this paper. Some of these issues are: (1) the consistency of the UCH Convention with the LOSC;<sup>154</sup> (2) the conflict of values between the principal users of UCH (the archeological community, the treasure salvage community and the sport diving community);<sup>155</sup> (3) potential conflict with national legislation;<sup>156</sup> (4) the application of salvage law, the law of

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Shipwrecks in International Waters: The Case of Japanese Submarine I-52,” (2001) 49 *Buffalo Law Review* 931.

<sup>154</sup> David J. Bederman, “The UNESCO Convention on Underwater Cultural Heritage: Panacea or Peril for Resource Managers?” in Jennifer R. Richman & Marion P. Forsyth, *Legal Perspectives on Cultural Resources* (United States: Altamira Press, 2004), 145-146, opines that despite the harmonizing provision of Article 3, the UCH Convention is still in many respects inconsistent with the LOSC. He thinks this is true for Articles 9 through 12 of the UCH Convention on coastal state jurisdiction and activities in the Area, as well as provisions which contradict the preservation of the law of salvage and maritime law in Article 303 of the LOSC. He adds that Article 10 (2) of the UCH Convention is an unambiguous amendment to the LOSC which could enter in force, as provided for in the UCH Convention, with as little as twenty ratifications.

<sup>155</sup> Paul Fletcher-Tomenius and Craig Forrest, “Historic Wreck in International Waters: Conflict or Consensus?,” *Marine Policy*, 24 (2000): 1; Jeffrey T. Scrimo, “Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks,” *Ocean and Coastal Law Journal*, 5 (2000): 271; John Alan Cohan, “An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One),” *Environs Environmental Law and Policy Journal*, 27 (2004): 349.

<sup>156</sup> James A. R. Nafziger, “The Underlying Constitutionalism of the Law Governing Archeological and Other Cultural Heritage,” *Willamette Law Review*, 30 (1994): 581. For example, the US federal Abandoned Shipwreck Act (ASA) claims federal ownership of abandoned shipwrecks embedded in a state’s submerged land and simultaneously transfers title to the wrecks to the states for administration, management and regulation. See Sean D. Murphy, “US Concerns Regarding UNESCO Convention on Underwater Heritage,” *American Journal of International Law*, 96 (2002): 468. For a discussion of the ASA, see Roberto Iraola, “The Abandoned Shipwreck Act of 1987,” *Whittier Law Review*, 25 (2004): 787. But see Sherri J. Braunstein, “Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act is Still Causing Confusion Rather than Preserving Historic Shipwrecks,” *Widener Law Symposium Journal*, 8 (2002): 301. Another example is Australia’s domestic legislation on UCH, the Historic Shipwrecks Act, which declares all remains of a ship which are “situated in Australian waters or above the continental shelf of Australia” and at least 75 years old to be “historic shipwrecks” and declares a protected zone around a historic shipwreck or historic relic. (ss 4a, 7). See Constance Johnson, “For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage,” *Melbourne Journal of International Law*, 1 (2000): 19. See also Liza J. Bowman, “Oceans Apart Over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?” *Osgoode Hall Law Journal*, 42 (2004): 1.



finds and admiralty law;<sup>157</sup> and (5) issues of sovereign status of State-owned vessels and State succession.<sup>158</sup>

## 6. Conclusion

The adoption of the UCH Convention should be regarded as a monumental achievement and a major step in the progressive development of international law. The UCH Convention institutionalizes a comprehensive legal regime for the preservation and protection of UCH that addresses the gaps and improves the protective regime under the LOSC. The UCH Convention succeeded in making the protection and preservation of UCH a global priority. Now, all that is left is for these laudable objectives to be realized.

This paper examined the international legal framework on the protection of underwater cultural heritage by laying particular emphasis on the protective regimes under the UCH Convention and the LOSC. Towards this end, the paper provided the theoretical and historical background of the UCH Convention and established its relation with LOSC. It then proceeded to discuss the salient provisions of the UCH Convention. Then, the protective regimes within the different maritime zones under both the LOSC and the UNESCO Convention

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<sup>157</sup> See excellent discussion of Guido Carducci, "The Crucial Compromise on Salvage Law and the Law of Finds" in Roberta Garabello and Tullio Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, 2003), 193 – 206. See also Craig Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?" *Journal of Marine Law and Commerce*, 34 (2003): 309; Anne M. Cotrell, "The Law of the Sea and International Marine Archeology: Abandoning Admiralty Law to Protect Historic Shipwrecks," *Fordham International Law Journal*, 17 (1994): 667. See also John D. Kimball, "Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3D 943, 1999 AMC 1330 (4TH CIR. 1999)," *Journal of Marine Law and Commerce*, 30 (1999): 691. See also Mark A. Wilder, "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries," *Defense Counsel Journal*, 67 (2000): 92. See interesting discussion in Justin S. Stern, "Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks" *Fordham Law Review*, 68 (2000): 2489. See also Terence P. McQuown, "An Archeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks," *William Mitchell Law Review*, 26 (2000): 289.

<sup>158</sup> Jerry E. Walker, "A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations," *University of San Francisco Maritime Law Journal*, 12 (1999-2000): 311. For discussion on both property rights and sovereignty issues involved in cultural property disputes, see Evangelos I. Gegas, "International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property," *Ohio State Journal of Dispute Resolution*, 13 (1997): 129. Please also refer to discussion on the legal status of sunken warships above. See also issues on litigation of disputes in Peter E. Hess "Deep Shipwreck in High Courts," 17 *Delaware Lawyer*, 17 (1999): 16; and Nafziger, James A.R. "The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck," *Harvard International Law Journal*, 44 (2003): 251.

were discussed. Lastly, a critique of the UCH Convention was provided by identifying its strengths and weaknesses.

In conclusion, two final points need to be underscored. **First**, is the importance of international cooperation. Corollary to this is the need for widespread ratification.<sup>159</sup> The UCH Convention will only be truly effective if it is binding. The basis of all of international law, which is at the heart of the UCH Convention, is the principle of cooperation.<sup>160</sup> The UCH Convention will succeed or fail on this aspect alone. At the national level, and in furtherance of the objectives of the UCH Convention, States must be willing to enact domestic legislation<sup>161</sup> that deter and punish the looting, theft and smuggling<sup>162</sup> of UCH. In the meantime, in strong recognition of the international concern over the continuing loss of UCH on a global scale, States should endeavor to comply with the spirit and principles of the Convention and implement on a voluntary basis the Rules of the Annex. The Rules of the Annex emphasize the need to uniformly apply current professional standards in archaeological methods and techniques to any activity directed at underwater cultural heritage.

**Lastly**, in the long-term, the importance of capacity-building, education and training, and a global awareness campaign must be emphasized. The success of the UCH Convention in achieving its aims of protecting and preserving UCH,

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<sup>159</sup> Aside from the substantive issues discussed above, there is also the issue of forum. Norway, for example made a formal declaration that it reserves its position that UNESCO is the appropriate forum for the negotiation and adoption of the UCH Convention. General remarks of Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of Foreign Affairs, 19 April 1999 as cited in Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage," *International Comparative Law Quarterly*, 51 (2002): 517.

<sup>160</sup> Article 2 (2), UCH Convention.

<sup>161</sup> Many states with a rich archeological tradition have enacted domestic legislation vesting ownership of antiquities in the national government (for example, the Antiquities Act of 1906 of the United States). This type of legislation creates the presumption that any activity undertaken without the permission of the state is an act of theft. The public policy is the prosecution of theft and the restitution of the object to its original owner. See Patty Gerstenblith, Symposium Ownership and Protection of Heritage: Cultural Property Rights for the 21<sup>st</sup> Century, "The Public Interest in the Restitution of Cultural Objects," *Connecticut Journal of International Law*, 16 (2001): 212. See also Lawrence M. Kaye, "Art Wars: The Repatriation Battle," *New York University Journal of International Law and Policy*, 31 (1998): 79.

<sup>162</sup> Two international conventions call upon States parties to respect each others' export restrictions on cultural property, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971)] and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects [reprinted in *Uniform Law Review* N.S. 1(1996): 110; *Art Antiquity and Law* 79, 1 (1996): 79; *International Journal of Cultural Property*, 5 (1996): 155] have been promulgated.

especially for the next generations, will depend not only on the cooperation among States but with all interest groups as well.